

ILLINOIS POLLUTION CONTROL BOARD
May 5, 1988

ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Complainant,)	
)	
v)	PCB 88-36
)	
MERVIS INDUSTRIES, INC.,)	
)	
Respondent.)	

ORDER OF THE BOARD (by J. Anderson):

On March 9, 1988, Mervis moved the Board in the alternative to either a) dismiss the February 18, 1988 Complaint in this matter in its entirety, or b) to dismiss Count I of the Complaint or to stay proceedings concerning that Count. The Agency filed a response in opposition on March 22, 1988. Noting that these pleadings alleged and relied upon facts not then of record, by Order of April 7, 1988, the Board granted the parties leave to supplement the record. On April 26, 1988, each party filed documents and supporting affidavits relative to the motion and response.

For the reasons set forth below, Mervis' motion is denied in its entirety.

The Arguments Concerning Complete Dismissal

The Complaint concerns activities conducted by Mervis since approximately 1985 at a former railroad switching yard known as the Lyons Yard located south of Danville in Vermilion County. Mervis receives certain materials at its site by railroad car which the Complaint characterizes as primarily materials which were discarded and/or which no longer are capable of serving their original purpose such as dirt, rock, broken ties, and scrap metal generated during the reconstruction of railroad beds but also including wooden pallets, construction and demolition debris, fly ash and other materials. The Complaint further alleges that such materials are sorted by Mervis, with some being segregated for reuse and some being reloaded for landfill disposal off-site.

Count I of the Complaint charges that these activities are a violation of Section 21(d) of the Act on the basis that Mervis, by operating a waste transfer station, is thus operating waste storage facility without Agency permits. Counts II and III of

the Complaint allege that Lyons Yard is in violation of provisions of the Act relating to dust, odors, and noise.

Mervis presents four arguments for dismissal of the Complaint as a whole. The first three, that the Complaint 1) fails to state a cause of action, 2) is duplicitous, and 3) is frivolous, merit little discussion by the Board as the law and facts clearly indicate that the Complaint is sufficiently well-pleaded to go to hearing, and that this case, the sole enforcement action pending against Mervis, seeks relief which the Board is empowered to grant. (See Agency Response of 3-22-88, pp. 1-5 and cases cited therein.)

The fourth argument for dismissal is more troublesome. Mervis asserts that the Agency failed to comply with the pre-enforcement notice requirements of Section 31(d) of the Act. Section 31(d) provides in pertinent part that:

- d. "prior to issuance and service of a written notice and formal complaint under ... Section [31(a)], the Agency shall issue and serve upon the person complained against a written notice informing such person that the Agency intends to file a formal complaint. Such written notice shall notify the person of the charges alleged and offer the person an opportunity to meet with appropriate agency personnel in an effort to resolve such conflicts which could lead to the filing of a formal complaint. Such meeting shall be held within 30 days of receipt of notice by the person complained against unless the Agency agrees to a postponement, or the person complained against fails to respond to the notice or such person notifies the Agency that he will not appear at a meeting. Nothing in this subsection is intended to preclude the Agency from following the provisions of subsection (a) of this Section after the provisions of this subsection are fulfilled."

The basis for this assertion is that the Agency's August 22, 1986 pre-enforcement conference letter did not advise Mervis of Agency concerns in three specific areas, each of which were included in the complaint filed against Mervis on February 18, 1988. These are that the Agency believes Mervis to be a waste transfer station in violation of Section 21(d), and that the Agency believes that Mervis' operation is in violation of regulations and standards concerning noise and dust.

In its March 22, 1988 Response (pp. 6-7), Agency comments that

"As the respondent correctly notes, there are no time limits set forth in Section 31(d) on how long the process initiated by the 31(d) notice can continue. Nor are there any prohibitions in sections 31(d) against partial resolutions of the conflicts between the Agency and a respondent and litigation of the remainder. Nor is there anything in Section 31(d) to indicate that if information about the operations of a potential violator is obtained during the 31(d) process which discloses additional violations, those violations should not be addressed as well."

In its April 26 filing, Mervis has provided documents, and a table of contents to those documents, which provide the chronology of meeting held between Mervis and the Agency and the substance of those meetings. The transfer station, noise and dust issues were clearly all subjects of discussion no later than the parties' September 24, 1987 meeting (Mervis' Response of 4-26-87, Exh. 17). It would appear that informal discussion was commenced as early as November, 1986, in the context of Mervis' defense to similar allegations in a then-pending citizens' enforcement suite Americans for A Clear Environment v. Mervis Industries, Inc. and H & L Landfill, Inc., PCB 86-68 (dismissed without prejudice March 19, 1987).

Given all of the facts and circumstances of this case, and the continuum of communication between the Agency and Mervis, the Board finds that Mervis received actual notice of all of the elements of the instant complaint long in advance of its filing, as well as an opportunity to discuss and resolve violations perceived by the Agency. Accordingly, the Board is not persuaded that Section 31(d) requirements have not been met.

Arguments Concerning Dismissal or Stay of Count I

This record now clearly indicates that one of the primary disputes in this matter is whether the materials handled by Mervis are "wastes" as defined in Section 3.53 of the Act. Mervis contends that they are not, and that hence Mervis is not subject to Section 21(d) permitting requirements as a waste transfer or waste storage facility.

On February 16, 1988 -- two days before the filing of this Complaint -- Mervis filed a Verified Complaint for declaratory relief with the Circuit Court of Vermilion County asking, in essence, that this and related issues be resolved by the Court.

Pendency of this action is the ground urged for stay or dismissal of Count I.

The Board agrees with the Agency that the action before the Board provides the most appropriate vehicle in which to conclude the entire controversy surrounding Mervis' operations. Moreover, to the extent that this case involves construction of the term "waste transfer station", a term not currently defined in the Act, the Board believes that it is appropriate for it to utilize its technical expertise in environmental matters to give expeditious guidance to the parties as well as to other potentially affected persons.

Again, for all of the foregoing reasons, Mervis' March 9, 1988 motion is denied in its entirety.

IT IS SO ORDERED.

J. Marlin concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 5th day of May, 1988, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board